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No. 01-1179

IN THE Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

JULIO ABRAHAM, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 15.8

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SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 15.8

Petitioner Bank of America, N.A., submits this supplemental brief in response to the *amicus curiae* brief filed by the Solicitor General.

1. On the key factual dispute in this case, the Solicitor General agrees with Petitioners. The 44 Respondents who are participants in the ERISA plan filed two lawsuits: one in federal court alleging that the defendants had violated fiduciary duties owed to plan participants imposed by ERISA in approving Norcal's merger with Envirocal, and another in state court alleging that this same act by the same defendants violated additional fiduciary duties owed to these 44 plan participants, as well as 103 others, in their capacity as former shareholder and current noteholders. *See* U.S. Br. 3-4. The Solicitor General thus disagrees with Respondents' contention that their state-law "claims do not arise from the same acts that would give rise to liability under ERISA." Br. in Opp. 16.

2. The Solicitor General also agrees with Petitioners on several other key points. *First*, ERISA imposes on ERISA fiduciaries a duty to "act *solely* in the interest of plan participants," *see* U.S. Br. 4 (quoting ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)) (emphasis added)[1] – something that a fiduciary cannot do if compelled by state law to act in the interest of former shareholders or noteholders. *Second*, the Solicitor General agrees that "complete preemption" under ERISA is not limited to claims for benefits under Section

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[1] Later in his brief, the Solicitor General states that "an ERISA fiduciary *ordinarily* is required to act solely in the interests of plan participants." U.S. Br. at 12 (emphasis added). The statutory text contains no such qualification.

502(a)(1)(B), but "applies to claims that fall within other subsections of Section 502(a)," including claims for breach of fiduciary duty. U.S. Br. at 8 & n.3. *Third*, he acknowledges (Br. 17 n.15) that ERISA creates a uniform body of federal law to govern the duties of ERISA fiduciaries, in order to allow fiduciaries to "predict the legality of proposed actions without the necessity of reference to varying state laws," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), and to avoid conflicts that would arise if an ERISA fiduciary were subject to ERISA fiduciary duties and state-law fiduciary duties with respect to the same acts. *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

3. In addition, the Solicitor General appears to agree with Petitioners that at least some of Respondents' state-law claims are preempted by ERISA: "The state-court complaint may be read to allege that the committee members had a state-law duty to act (at least in part) in the interest of all 147 respondent noteholders when deciding whether to approve the Envirocal merger." U.S. Br. 13 (citing complaint). Moreover, the Solicitor General recognizes, "[a] state law requiring an ERISA fiduciary, based on the interests of the noteholders, to vote for or against a merger of a corporation in which the plan owns stock *would appear to conflict* with the specific requirement in Department of Labor regulations that a fiduciary, in voting an ESOP's shares, 'consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." *Id.* at 13-14 (quoting 29 C.F.R. § 2509.94-2) (emphasis added). The Solicitor General acknowledges that "such a conflict *could lead to preemption* of state-law claims

against the fiduciaries." U.S. Br. 14 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001)) (emphasis added).[2]

4. The Solicitor General nonetheless concludes that "[w]hether the court of appeals erred in finding no preemption under Section 514(a)" does not affect the court's conclusion that the case was not subject to removal under the complete preemption doctrine, U.S. Br. 14, "[b]ecause respondents are not asserting rights they enjoy as participants in or beneficiaries of an ERISA plan, [and] their claims do not arise under Sections 502(a)(2) or (3)," U.S. Br. 9. This "analysis" is fundamental to the Solicitor General's position and it is fundamentally wrong.

In ERISA preemption cases, plan participants generally assert state-law claims in some capacity other than that of a participant in an ERISA plan, for example, as an employee, *see, e.g.*, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); a patient, *see, e.g.*, *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999); or a party to a contract, *see, e.g.*, *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992). Despite such assertions, courts – including this Court did in *Taylor* and the Second and Eighth Circuits in *Smith* and *Hull* – hold that the plaintiffs' state-law claims are completely preempted by ERISA.

The Solicitor General acknowledges, *see* U.S. Br. 4, but then ignores the key fact in this case: 44 plaintiffs not only could but actually *did* sue in their capacity as ERISA plan participants. Their parallel action in federal court asserted that the defendants had violated their fiduciary duty under ERISA by engaging in the very same actions

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[2] The "would appear" and "could . . . preempt" qualifications are baseless. The conflict is clear and federal law clearly preempts conflicting state law. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

challenged in the state-court action. Obviously, this case could not have been removed if the ERISA plan participants had stayed out of the state-court action, because Section 502 "does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27 (1983). But the plan participants chose instead to take two bites at the apple by suing for breach of state-law fiduciary duties in state court and breach of ERISA fiduciary duties in federal court.

Congress has provided that federal courts have *exclusive* jurisdiction over claims of breach of a fiduciary duty imposed by ERISA. *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).[3] Under the Solicitor General's approach, ERISA plan participants can bring separate actions in state and federal court challenging the very same act of an ERISA fiduciary as a violation of (1) fiduciary duties imposed by ERISA and (2) additional fiduciary duties imposed by state law – even if the plan participant's state-law claims are preempted by ERISA. Thus, for example, plan participants could litigate their claim for breach of a state-law fiduciary duty to noteholders in state court, and if they lost could pursue their ERISA action in federal court.[4] This hardly effectuates Congress's intent to create a uniform body of

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[3] In contrast, state and federal courts have concurrent jurisdiction over claims for benefits. *See id.*

[4] In most cases, plaintiffs who split their cause of action between state and federal courts will be precluded by the first action to come to judgment. *See* Restatement (Second) of Judgments §§ 18, 19, 24 (preclusion of all claims that were brought or could have been brought arising from the same transaction). However, the 44 ERISA plaintiffs could seek to avoid preclusion on the ERISA claim because federal courts have exclusive jurisdiction over such claims, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and thus the claim could not have been brought in state court.

federal law governing the duties of ERISA fiduciaries, and to centralize adjudication of fiduciary breach claims in the federal courts.

The Solicitor General's reliance on this Court's decision in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), is unwarranted. *Caterpillar* differs from this case in at least two crucial respects. *First*, it concerned complete preemption under Section 301 of the Labor Management Relations Act (LMRA) rather than ERISA. Complete preemption under Section 301 is limited to claims that require the court to interpret a collective bargaining agreement. *See Livadas v. Bradshaw*, 512 U.S. 107, 122-24 (1994); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Applying this limitation, the Court held that "Caterpillar's basic error [was] its failure to recognize that a plaintiff covered by a collective bargaining agreement is permitted to assert rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 396 (emphasis in original). The same is not true under ERISA.

"Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty." *Firestone*, 489 U.S. at 110. Consequently, an ERISA plan participant's breach of fiduciary duty claim may be completely preempted, even if it does not require the court to interpret the ERISA plan. *See, e.g., Dudley Supermarket, Inc. v. Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1 (1st Cir. 2002) (state-law breach of fiduciary duty claim completely preempted even though it did not require interpretation of ERISA plan); *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999) (same).

Caterpillar also differs from this case in that the plaintiffs "could have brought suit under § 301" but "they

chose not to do so." 482 U.S. at 395. Here, as noted above, the plaintiffs made the opposite choice: they brought suit under ERISA alleging a breach of ERISA's fiduciary duties.

Courts have observed that "the term 'complete preemption' is unfortunate, since the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine." *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1486-87 (7th Cir. 1996) (internal quotation and citation omitted). "This jurisdictional doctrine provides that to the extent that Congress has displaced a plaintiff's state law claim, that intent informs the well-pleaded complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly recharacterized as a complaint arising under federal law." *Id.* at 1487 (internal quotations and citations omitted). In this case, ERISA plan participants challenged actions of ERISA fiduciaries that lie at the very core of a fiduciary's responsibilities under ERISA – voting shares held by the plan for or against a proposed corporate transaction. This is miles removed from the zoning law decisions and other state or local law issues that ERISA trustees confront on a daily basis. *Compare* U.S. Br. 12. The plan participants argue that the ERISA fiduciaries owed plan participants fiduciary duties under ERISA *and* owed them additional fiduciary duties under state law. But Congress intended ERISA to provide the sole source of fiduciary duties with respect to such actions, and thus it completely preempted this area of the law. *See Smith v. Provident Bank*, 170 F.3d at 613, 614; *Dudley Supermarket*, 302 F.3d at 3.

5. The Solicitor General asserts that the state-law fiduciary duties at issue in this case pre-date, and are independent of, Respondents' rights under ERISA as plan participants. See U.S. Br. 11, 14, 17-20. This is inaccurate. Respondents' sale of stock to Norcal, the issuance of the notes, and the creation of the ESOP, were all parts of a single unified transaction. More generally, the Solicitor General asserts that an ERISA fiduciary "may reasonably be held

liable for breach of both ERISA and state-law duties in at least some circumstances, . . . and can generally take steps – such as resigning from the ERISA role – to avoid conflicts." U.S. Br. 13.[5] The Solicitor General greatly underestimates the difficulties of reconciling conflicting federal and state fiduciary duties. If a corporate officer or director subject to a fiduciary duty seeks to delegate her powers to someone else, the person to whom the power is delegated may become subject to the fiduciary duty. *See Smith v. Provident Bank*, 170 F.3d at 613. Thus, if fiduciaries such as the members of the ESOP Administrative Committee were to resign and appoint others to take their places, the newly-appointed fiduciaries would still have responsibilities under ERISA, and the Solicitor General offers no reason to believe they would escape conflicting state-law fiduciary duties.

6. The Solicitor General does not dispute that so-called "exempt" transactions by ESOPs remain heavily regulated under ERISA. Although he concludes that the Ninth Circuit did not base its decision on the exempt nature of the transactions, in fact the court cited that factor repeatedly in support of its decision. *See* Bank of America Reply 3 (collecting multiple statements from Ninth Circuit's opinion). The Solicitor General mistakenly asserts that this

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[5] *See also id.* at 14 (stating that "there may be more room for the operation of state law" where ERISA fiduciaries are alleged to have "breached a pre-existing state-law duty by putting themselves in a position (as ERISA fiduciaries) where they could have to act in conflict with their state-law duties"). The Solicitor General's multiple qualifications – ERISA fiduciaries "may" (or may not) be held liable "in at least some [unspecified] circumstances" but not others, while ERISA fiduciaries "generally" (but not always) can act consistently with both sets of duties – ignore this Court's recognition that ERISA fiduciaries should be able to "predict the legality of proposed actions without the necessity of reference to varying state laws." *Pilot Life Ins.*, 481 U.S. at 56.

aspect of the Ninth Circuit's opinion was relevant only to its holding on preemption, not complete preemption. The structure of the Ninth Circuit's opinion (the analysis of preemption preceded and guided the analysis of complete preemption) and the Ninth Circuit's own statement, in its discussion of the complete preemption issue, that "the leveraged buyout is an exempted transaction" under ERISA, Pet. 19a, both show that the Ninth Circuit's misplaced reliance on the exempt nature of the transactions infected its entire opinion, including the complete preemption ruling.

7. The Solicitor General concludes that no other court of appeals has addressed "whether ERISA completely preempts state-law claims by ERISA participants based on alleged violations of pre-existing and independent state-law duties." U.S. Br. 17. As noted above, however, the Solicitor General is simply wrong. Petitioners' fiduciary duties to former shareholders and current noteholders arose out of the very same transaction that gave rise to their fiduciary duties under ERISA. These state-law fiduciary duties are no more "pre-existing" or "independent" of ERISA fiduciary duties than the state-law duties at issue in decisions of other courts of appeals that have found complete preemption.

In *Smith v. Provident Bank*, 170 F.3d at 612, for example, the plaintiff, in advancing a state-law claim for breach of fiduciary duty in a securities transaction, was not asserting rights as a participant in an ERISA plan, but instead was asserting rights under state law as a brokerage customer. The state-law fiduciary duties applied to all brokerage accounts, not just ERISA accounts. If similar state-law claims had been asserted solely by plaintiffs who were not ERISA participants or beneficiaries, the case could not have been removed. Nonetheless, the Sixth Circuit held that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question." 170 F.3d at 614. *See also Dudley Supermarket, Inc.*, 302 F.3d at 3 ("There can be no doubt that if appellants' purported state

law claims in fact charged [the defendant] with breach of fiduciary duty while acting as an ERISA fiduciary, ERISA would preempt completely their claims which would thus have to be asserted, if at all, under ERISA."); *id.* at 5 (where the defendant "is on the fiduciary side of the line . . . we are dealing with complete preemption").

Similarly, in *Smith v. Dunham Bush, Inc.*, 959 F.2d at 7, the plaintiff sued as a party to a contract and an employee; he could have advanced the same state-law claim even if he had not been a participant in the employer's ERISA plan (or if the employer had no U.S. pension plan at all). The Second Circuit nevertheless held that the plaintiff was, in essence, claiming pension benefits and therefore his state-law claim was completely preempted. *Id.* at 11.

8. Finally, the Solicitor General suggests that review is not warranted because all the defendants, except Bank of America, settled with the plaintiffs prior to the Ninth Circuit's ruling. U.S. Br. 15. Petitioners retain a vital interest in this case, however, because Bank of America *prevailed* after a lengthy trial in district court and thereby resolved more than $20 million of liability claims against it. That victory was erased by the Ninth Circuit's ruling that that the federal court lacked jurisdiction, thus subjecting both Bank of America and the ESOP to potential liability.[6]

Apart from its effects on the parties to this case, the Ninth Circuit's ruling creates great uncertainty for ERISA plan fiduciaries, who now must be concerned that they are subject to fiduciary duties under the law of one or more States, as well as under ERISA, whenever a plaintiff elects to sue them in a capacity other than that of a plan participant or

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[6] Although the Norcal ESOP has settled with the Respondents, it may be liable to the Bank in the event that the Bank is held liable to the Respondents.

beneficiary. The brief of the United States actually increases this uncertainty. Review by this Court is warranted to resolve the conflict between the Ninth and other Circuits and to provide ERISA fiduciaries with renewed assurance that they can "predict the legality of proposed actions without the necessity of reference to varying state laws." *Pilot Life Ins.*, 481 U.S. at 56.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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